Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, Secretary of the Interior,
Appellant,

vs.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
(THREE-JUDGE COURT) FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

GEORGE T. HARRIS, JR.
Special Assistant Attorney General
State of New Mexico

GEORGE J. HOPKINS
Of Counsel
Post Office Box 2168
Albuquerque, New Mexico 87103
Attorneys for Appellees

E. L. MERCHANT, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-2030

INDEX

Motion to Dismiss or Affirm 1

Constitutional Provisions and Statutes Involved 2

Questions Presented 3

Statement of the Case 3

Summary of Argument 4

Argument—

I. Whether the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property and Commerce Clauses of the U. S. Constitution 7

II. Whether the Act intrudes upon the sovereignty and legislative authority of the State as attested to by the Tenth Amendment, and undermines the traditional concepts of State powers over resident wild animals 19

Conclusion 26

Citations

CASES

A. E. Nettleton Co. v. *Diamond*, 264 N.E.2d 118 (N.Y. 1970) 22

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 8

Alabama v. *Texas*, 347 U.S. 272 (1954) 9

Arkansas State Game and Fish Commission v. *W. R. Wrape Stave Co.*, 76 F. Supp. 323 (E.D. Ark. 1948) 22

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 11, 12

Barrett v. *State of New York*, 116 N.E. 99 (N.Y. Ct. App. 1917) 22
Camfield v. *United States*, 167 U.S. 518 (1897) 10
Carey v. *South Dakota*, 250 U.S. 118 (1919) 22
Chalk v. *United States*, 114 F.2d 207 (4th Cir. 1940), *cert. den.* 312 U.S. 679 (1941) 16
Clason v. *State of Indiana*, 306 U.S. 439 (1939) 24
Colorado v. *Toll*, 268 U.S. 228 (1925) 10
Elm City Broadcasting Corp. v. *United States*, 235 F.2d 811 (D.C. Cir. 1956) 18
Federal Compress and Warehouse Co. v. *McLean*, 291 U.S. 17 (1934) 25
Federal Power Commission v. *State of Oregon*, 349 U.S. 435 (1955) 13
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 21
Geer v. *Connecticut*, 161 U.S. 519 (1896) 19, 21, 23
Gibson v. *Chouteau*, 80 U.S. (13 Wall.) 92 (1871) 9
Haskell v. *United States*, 241 F.2d 790 (10th Cir. 1957), *cert. den.* 354 U.S. 921 (1957) 18
Hunt v. *United States*, 278 U.S. 96 (1928) 8, 21
Kansas v. *Colorado*, 206 U.S. 46 (1907) 10
Kansas Pac. Ry. Co. v. *Atchison, T. & S.F. R. Co.*, 13 F. 166 (C.C.A. Kan. 1881), *reversed on other grounds* 112 U.S. 414 (1884) 13
Lacoste v. *Department of Conservation*, 263 U.S. 545 (1924) 20, 21
Matthews v. *Handley*, 179 F. Supp. 470, *aff'd* 361 U.S. 127 (1960) 8
McCready v. *Virginia*, 94 U.S. 391 (1865) 20, 21
Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies*, 312 U.S. 287 (1941) 17

Missouri v. *Holland*, 252 U.S. 416 (1920) 8, 22
Newhall v. *Sanger*, 92 U.S. 761 (1875) 13, 14
New Mexico State Game Commission v. *Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. den.* 396 U.S. 961 (1969) 22
N.L.R.B. v. *Plasterers' Local Union No. 79*, 404 U.S. 116 (1971) 18
Oklahoma v. *Texas*, 258 U.S. 574 (1922) 15
Oregon v. *Mitchell*, 400 U.S. 112 (1970) 25
Patsone v. *Pennsylvania*, 232 U.S. 138 (1914) 21
Penn Dairies v. *Milk Control Commission*, 318 U.S. 261 (1943) 25
Rainier Nat. Park Co. v. *Martin*, 23 F. Supp. 60 (W.D. Wash. 1938), *aff'd* 302 U.S. 661 (1938) 16
Ruddy v. *Rossi*, 248 U.S. 104 (1918) 9
Silz v. *Hesterberg*, 211 U.S. 31 (1908) 21
South Carolina v. *United States*, 199 U.S. 437 (1905) 19, 25
State of Maine v. *Tamano*, 357 F. Supp. 1097 (D. Me. 1973) 22
State of Maryland v. *Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972) 22
State of Nebraska v. *State of Wyoming*, 325 U.S. 589 (1945) 13
Surplus Trading Co. v. *Cook*, 281 U.S. 647 (1930) 10
Tampa Electric Company v. *Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *reversed on other grounds* 365 U.S. 320 (1961) 18
Toomer v. *Witsell*, 334 U.S. 385 (1948) 20, 21, 22
Townsend v. *Yeomans*, 301 U.S. 441 (1937) 25
United States v. *Alaska*, 423 F.2d 764, *cert. den.* 400 U.S. 967 (1971) 14

United States v. *Chicago*, 48 U.S. 185 (1849) 13-14
United States v. *Kipp*, 369 F. Supp. 774 (D. Mont. 1974) 13, 14
United States v. *Oregon*, 366 U.S. 643 (1961) 18
United States v. *Plott*, 345 F. Supp. 1229 (S.D. N.Y. 1972) 22
United States v. *State Tax Commission of Mississippi*, 412 U.S. 363 (1973) 12, 13
Utah Power and Light Co. v. *United States*, 243 U.S. 389 (1917) 9
Ward v. *Race Horse*, 163 U.S. 504 (1896) 21, 25
Wilcox v. *Jackson*, 38 U.S. 418 (1839) 13
Wilson v. *Cook*, 327 U.S. 474 (1946) 23
Yellowstone Park Transp. Co. v. *Gallatin County*, 31 F.2d 644 (9th Cir. 1929), *cert. den.* 280 U.S. 555 (1929) 16

CONSTITUTION AND STATUTES

United States Constitution
Property Clause, Art. IV, Sec. 3 .....7, 9, 11
Commerce Clause, Art. I, Sec. 8 17
Amendment X 21, 25
16 U.S.C. §1-3 15
16 U.S.C. §26 15
16 U.S.C. §98-99 15
16 U.S.C. §201, 221 15
16 U.S.C. §671-697a 15
40 U.S.C. §255 .....12, 13
Endangered Species Act of 1973, 16 U.S.C. (Supp. III) §1531 *et seq.* at §1533(d) 15
Fur Seal Act of 1966, 16 U.S.C. §1151 *et seq.* 16, 17

Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. III) §1361 *et seq.* 16, 17
National Wildlife Refuge System Act, 16 U.S.C. §668dd-668ee 15
The Pickett Act, 36 Stat. 847, 43 U.S.C. §141 13
Wild and Scenic Rivers Act, 16 U.S.C. §1271 *et seq.* at §1284 15
Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) §1331-1340 .....4, 7, 8, 16, 17, 19, 22
47-23-1, 6 New Mexico Statutes Annotated (1973 Pocket Supp.) 2, 24
1891 Mont. Laws 262, February 14, 1891 16
1901 Session Washington Laws 192 16
1915 North Carolina Laws 205, North Carolina Code Annotated (1939) 16
Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222 16
Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. §117 16

OTHER MATERIALS

General Services Administration, Washington, D.C., *Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967*, Table 4, p. 46 17
Hagenstein, *One Third of the Nation's Land*, 12 Natural Resources Journal 56, at 59 (1972) 13, 14
Held, *Whose Public Lands?*, 7 Natural Resources Journal 153 (1967) 13
Webster's Third New International Dictionary 1836 (1966) 14

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, Secretary of the Interior,
Appellant,

vs.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
(THREE-JUDGE COURT) FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein, or in the alternative, to affirm the Judgment of the United States District Court for the District of New Mexico on the ground that the questions presented are so insubstantial as not to need further argument.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appendix F and Appendix G to the Jurisdictional Statement contain the text of the Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) §1331-1340, Dec. 15, 1971, and certain pertinent provisions of the New Mexico Estray Statutes. Page 2 of the Jurisdictional Statement sets forth the Property Clause of the United States Constitution. The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appellees deem other provisions of the New Mexico statutes pertinent herein:

> 47-23-1. N.M.S.A. Short Title—Purpose. This Act (47-23-1 to 47-23-7) may be cited as "The Livestock Board Act". The Livestock Board Act shall be liberally construed to carry out its purposes which are to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico. (1973 Pocket Supp.)
>
> 47-23-6. N.M.S.A. Additional Powers of the Board. . . . the New Mexico Livestock Board shall have the following powers:
>
> (1) To exercise general regulatory supervision over the livestock industry of this State in order to protect the industry from theft and contagious or infectious diseases and in order to protect the public from diseased or unwholesome meat or meat products; . . . (1973 Pocket Supp.)

QUESTIONS PRESENTED

1. Whether the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property and Commerce Clauses of the U. S. Constitution.

2. Whether the Act intrudes upon the sovereignty and legislative authority of the State as attested to by the Tenth Amendment, and undermines the traditional concepts of State powers over resident wild animals.

STATEMENT OF THE CASE

Appellees deem several matters contained in the Jurisdictional Statement to require clarification, and wish to set forth other matters omitted by the Jurisdictional Statement.

At pages 4-5 of the Jurisdictional Statement, Appellant sets forth some of the facts giving rise to the filing of the complaint below, and the three-judge court's disposition of the cause. Appellees would supplement that summary as follows:

1. The burros which are the subject of this litigation were at all times material hereto freely roaming upon private, state and federal lands; primarily upon private lands (Tr. 34-37; 39; 50).

2. The subject animals proliferate rapidly and disrupt livestock operations (Tr. 8-9; 41-42; 44; 55-56).

3. The New Mexico rancher requested assistance from the New Mexico Livestock Board only after the United States Bureau of Land Management had refused to remove

the subject animals from the mixed private-state-federal property (Tr. 40-41; 49; Pl. Ex. 5; Memorandum Opinion of the court below, at p. 2).

4. There is no interstate or international migration of the wild horses and burros which reside in the State of New Mexico (Tr. 9-11).

5. The decision below was not, as indicated by Appellant, based upon cross-motions for summary judgment; the court below held an evidentiary hearing. The decision is based upon the testimony, exhibits and other evidence introduced at that hearing, and upon trial briefs submitted by the parties.

The Act itself fails to mention or make any finding regarding interstate commerce, and no evidence of such is before this Court. The Act makes no withdrawal, reservation or condemnation of the lands which are the subject of the Act, but is applicable to the general public domain. Congress has made no setting aside of a sanctuary or refuge for the particular purpose herein.

SUMMARY OF ARGUMENT

The decision below should be affirmed, or in the alternative, this appeal should be dismissed, because there is no specific delegation of power to Congress which would enable Congress to enact the Wild Free-Roaming Horses and Burros Act.

The State legislative authority is still applicable to the lands which are the subject of the Act, and the United States does not exercise exclusive jurisdiction over said lands. No withdrawal, condemnation, purchase or reservation of the subject lands for this particular purpose has been made by Congress; the lands remain a part of the general public domain and subject to State legislative authority and traditional concepts of State powers over resident wild animals, as set forth by this Court in a number of opinions.

The authority of the United States to protect its lands is not at issue herein and will not sustain the Act; the Act was enacted to protect the subject animals, and not the land upon which they roam. The provisions in the Act regarding overpopulation are controls which the Act has provided to remedy problems which will be *caused by* the Act.

Neither the statute itself, nor the portions of the Committee Reports quoted by Appellant, contain any language regarding interstate commerce or any effect thereon. The Act itself is, by its express terms, based upon the Property Clause and not the Commerce Clause. There is no evidence before this Court from the proceedings below indicating any connection with or effect upon interstate commerce, and in fact, the evidence is to the contrary. The Commerce Clause is inapplicable herein.

The subject animals are not internationally migratory, nor is such found by the statute itself. There is no federal treaty regarding the subject animals.

This Court has not, to date, ever sustained the exaggerated federal powers asserted by Appellant herein, to wit: that any animal which happens to come in contact with federal property, however briefly, is transmuted into federal property at that instant. This Court has repeatedly held that the States, as owners in trust of resident wild animals, exercise all powers with regard to such

animals: the power to determine ownership, the power to regulate and control the taking or destruction of such animals, and complete regulatory powers. By doing so with regard to the subject horses and burros herein, the State of New Mexico has not (nor is such alleged) discriminated against interstate commerce, infringed on the treaty powers of the federal government, damaged federal lands, or otherwise exceeded any of the constitutional limitations placed upon the States.

A further ground for affirming the decision below is the necessity for the State of New Mexico to have the legislative authority, through its police power, to operate the estray laws of this State so as to prevent the depredation caused by the subject animals, prevent the spread of contagious and infectious diseases among bovine animals, and to protect the life, health, welfare and property of the citizens of this State. The federal Act makes no provision therefor, and cannot, constitutionally.

To hold otherwise, Appellees submit, would virtually abrogate the rule of State sovereignty as attested to by the Tenth Amendment, undermine the doctrine of State trustee powers over resident wild animals, and virtually abrogate the fish and game, conservation, nonresident licensing, and estray laws of the respective States. Appellant's extravagant view of federal authority under the Property Clause would create completely independent and sovereign "federal states" within the States, if carried to its logical conclusion.

ARGUMENT

I.

Whether the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property and Commerce Clauses of the U. S. Constitution.

The question here presented is whether Congress may, under the Commerce or Property Clauses of the Constitution, assert exclusive possessory rights, all power to control and regulate, and the right to destroy (i.e., assert ownership of) all unbranded and "unclaimed" horses and burros which may at any time set foot upon Bureau of Land Management or Forest Service lands. The Wild Free-Roaming Horses and Burros Act by its terms also operates upon private and State lands, once the animal has been "transmuted" into federal property by contact with public domain lands. The federal lands affected have not been condemned, withdrawn or reserved for the particular purpose herein, but remain a part of the general public domain. No sanctuaries or refuges are established.

The Wild Free-Roaming Horses and Burros Act states, at §1331, that the animals are "an integral part of the natural system of the public lands." From this express finding, it is apparent that Congress attempted to ground the Act on the Property Clause: Article IV, Section 3 of the Constitution. As held by the court below, the Act cannot be sustained as an exercise of the powers granted to Congress by the Property Clause. The extravagant view of federal authority entertained by counsel for Appellant is without basis in the Constitution, as construed by the decisions of this Court to date.

The federal government is a body of strictly limited powers, and the powers which were not specifically delegated to the federal government were reserved to the sovereign States of the Union. *Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Matthews* v. *Handley*, 179 F. Supp. 470 (N.D. Ind. 1959), *aff'd* 361 U.S. 127 (1960).

Certain narrow federal powers with regard to wild animals have been sustained by this Court. For example, the federal Treaty power involving internationally migratory birds prevailed over state legislation in *Missouri* v. *Holland*, 252 U.S. 416 (1920); and, the federal government was permitted to undertake reasonable steps necessary to protect its lands from serious injury, in *Hunt* v. *United States*, 278 U.S. 96 (1928). *Missouri* is inapplicable herein; the animals are not the subject of a treaty, and are not internationally migratory.

Hunt is inapplicable, although at pp. 9-10 of its Statement, counsel for Appellant claims the Act to be constitutional under *Hunt*, because it was enacted to enable the Government to destroy horses and burros damaging federal property. The statute is aimed at protecting the wild horses and burros, not at protecting the land they live on. It is understandable that the Department of Agriculture, speaking in the Senate and House Reports quoted by Appellant, was concerned about *problems* which would be *caused by* the Wild Free-Roaming Horses and Burros Act. The potential damage to federal lands is a direct *result* of the Act itself, and not a *purpose* of the Act. This necessitated inclusion of the provisions in the Act which control the numbers of animals protected thereby. An attempt by statute to internally resolve a problem which the Act itself

creates can certainly not be construed as the purpose of, or a constitutional underpinning for, the Act.[1]

Under the Property Clause, Congress has been given the power only to make rules and regulations for property "belonging to the United States". This power extends only over lands belonging to the United States; it does not extend over resident species of wildlife. Appellant has overlooked the last phrase of Article IV, Section 3 of the Property Clause: "and . . . nothing in the Constitution shall be so construed as to prejudice any claim of the United States, or of any particular State."

The cases cited by Appellant, with their broad language regarding the powers of Congress under the Property Clause, are not authority that the Secretary can claim exclusive possession, completely regulate and control, and destroy resident species of wild animals which touch, however briefly, upon the general public domain. Those cases must be limited to their factual context—that is, the conditions which Congress may impose upon the disposal of federal lands. See, *Alabama* v. *Texas*, 347 U.S. 272 (1954); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389 (1917); *Ruddy* v. *Rossi*, 248 U.S. 104 (1918); *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92 (1871).

It is well settled that the federal government may acquire lands necessary or convenient for the exercise of its powers within a State. Absent State consent or a cession of jurisdiction, exclusive jurisdiction does not accrue to the federal landowner. "It is not unusual for the United States to own within a state lands which are set apart and used

---

1. Had Congress desired to enact a constitutionally sound statute aimed at protecting the federal lands, it could, and undoubtedly would, have simply empowered the Secretary of Interior to destroy the horses and burros, or control their numbers, whenever the public domain was being damaged, or in imminent danger of such harm.

for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650 (1930) (Emphasis added); see also, *Colorado* v. *Toll*, 268 U.S. 228 (1925).

The State of New Mexico has made no such cession of jurisdiction with respect to the lands which are the subject of the Wild Free-Roaming Horses and Burros Act, and the right to regulate the subject animals remains in the State as an attribute of its sovereignty as discussed at Point II, *infra*.

This Court has on several occasions discussed the scope of the Property Clause, the decisions indicating that the power therein granted is of a protective nature and not one designed to intrude upon state authority. As declared by this Court in *Camfield* v. *United States*, 167 U.S. 518 (1897):

> While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state, which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, *so long as such power is directed solely to its own protection*. 167 U.S. at 525-26 (Emphasis added).

In *Kansas* v. *Colorado*, 206 U.S. 46 (1907) the Court stated:

> The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this Court in respect thereto. *But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.* 206 U.S. at 89 (Emphasis added).

The Act claims the right to possession, exclusive regulatory powers over, and control of the subject animals, even though the animals may wander onto private property, or remain upon private property indefinitely, subsequent to having touched upon BLM or Forest Service lands. This clearly contravenes long-established principles of ownership with regard to wild animals, and has no basis in the Property Clause. The federal lands defined in the Act surely cannot derive from the Property Clause these "Midas Touch" qualities which the Act seeks to create, instantaneously transmuting to federal property any object which happens to come in contact with the public land.

Appellant discusses *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), as holding that the powers of Congress under the Property Clause extend to "what the land contains". The decision is certainly not flexible enough to extend to the animals and the powers claimed herein.

In *Ashwander*, this Court held that the power of falling water, and the electric energy thus produced, were riparian rights which were acquired by the Government when it purchased the dam site; and that water powers and appurtenances thereto are regarded as real property. See 297 U.S. at 330-333. *Ashwander* is not inconsistent with the reversal hereinbelow; riparian and mineral rights in the land constitute real property rights which are obviously subject to the powers of the United States under the Property Clause.

Wild and free-roaming horses and burros do not issue from the soil, have not been dealt with in law as real property, are not "contained in the land", and are not within the scope of the Property Clause. Such a result would be entirely inconsistent with the numerous holdings of this Court concerning such wild animals, as set forth at Point II, below.

Ashwander is further distinguished because the United States exercised exclusive jurisdiction over the lands therein (a dam), which had been purchased by contract between the United States and a third party for a particular purpose. Such a purchase, of course, gives the United States exclusive legislative jurisdiction over the land purchased. The lands which are the subject of the Act herein have not been condemned, withdrawn, or purchased for a particular use. *United States* v. *State Tax Commission of Mississippi*, 412 U.S. 363 (1973); 40 U.S.C. §255.[2]

---

2. 40 U.S.C. §225 provides in relevant part:

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but . . . the government may, in such cases and at such times as (it) may deem desirable, accept or secure from the State in which any lands

(Continued on following page)

There are, generally, two broad categories of federal lands: 1) The original federal public domain that has not been reserved, condemned or withdrawn for particular uses; and, 2) Those specific areas of federal land where the United States enjoys exclusive jurisdiction, because of complete cession by the State to the United States, or by withdrawal, reservation or condemnation (purchase) of the parcel by the United States for particular uses. *Newhall* v. *Sanger*, 92 U.S. 761 (1875); *United States* v. *Kipp*, 369 F. Supp. 774 (D. Mont. 1974); *United States* v. *State Tax Commission of Mississippi, supra*; 40 U.S.C. §255, *supra*; *State of Nebraska* v. *State of Wyoming*, 325 U.S. 589 (1945); Held, *Whose Public Lands?*, 7 Natural Resources Journal 153 (1967); Hagenstein, *One Third of the Nation's Land*, 12 Natural Resources Journal 56 (1972); *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435 (1955); The Pickett Act, 36 Stat. 847, 43 U.S.C. §141 (withdrawal and reservation of lands by the President).

A withdrawal or reservation of lands by a competent authority for a lawful purpose operates to sever such lands from the public domain. *Kansas Pac. Ry. Co.* v. *Atchison, T. & S.F. R. Co.*, 13 F. 106 (C.C.A. Kan. 1881), *reversed on other grounds*, 112 U.S. 414 (1884); see also, *Wilcox* v. *Jackson*, 38 U.S. 418 (1839); *United States* v. *Chicago*, 48

Footnote Continued—

or interests therein under (its) immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as (it) may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the governor of such state or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be *conclusively presumed that no such jurisdiction has been accepted* (Emphasis added).

U.S. 185 (1849); *United States* v. *Alaska*, 423 F.2d 764 (9th Cir. 1970), *cert. den.* 400 U.S. 967 (1971).

The courts and Congress have consistently recognized the existence of these two types of federal lands, and the great difference in federal jurisdiction which exists between the two categories. There are remaining approximately 470 million acres of the original Federal public domain that have not been reserved, withdrawn, or condemned for particular uses.[3] The Wild Free-Roaming Horses and Burros Act applies to all Bureau of Land Management and Forest Service lands, and no withdrawal, condemnation or reservation of any land is made by the Act. The lands, therefore, remain a part of the public domain, subject to sale or disposal under general laws; the lands have not been reduced from general use, entry and acquisition. *Newhall* v. *Sanger, supra; United States* v. *Kipp, supra*. The purposes of the Act could have been, and can yet be, constitutionally satisfied by withdrawal and reservation of specific parcels of land for wild burro and horse sanctuaries and refuges.

Parts of the vast public domain have been reduced from general use, sale or disposal, entry and acquisition by specific withdrawals of reservations, parks, monuments, sanctuaries, refuges, special uses for Indians, and military needs. It is settled that Congress has authority, under the Property Clause, to make such withdrawals and reservations.

In *United States* v. *Kipp, supra*, the court discussed this distinction, citing *Webster's Third New International Dictionary 1836* (1966) and defining "public land" as:

---

3. Hagenstein, *One Third of the Nation's Land*, 12 Natural Resources Journal 56, at 59 (1972).

> . . . land owned by a government, especially a national government; specifically: that part of the United States public domain subject to sale or disposition under the Homestead laws.

The Court concluded by stating, *supra*, at 775-776: ". . . and were the problem merely one of statutory construction, it is quite clear that lands in Glacier Park would be held not to be public lands of the United States." See also, *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

Appellant, at page 9 of its Statement, discusses other federal acts which "must fall" should this Court affirm the decision below. The statement is incorrect as to each act cited by Appellant. The statutes cited either contain express language maintaining the traditional powers of the States over wild animals upon the federal lands which are the subject of the statutes, or the statutes are otherwise distinguished from the Act herein.[4]

---

4. The fears expressed by Appellant at footnote 4, page 9 of its Jurisdictional Statement are unfounded. 16 U.S.C. §671-697a and 16 U.S.C. §26, 98-99 are constitutionally sound, even should this Court affirm the court below. Congress provided for withdrawal or reservation of these lands for sanctuaries and refuges, and for wildlife protection in the national parks (e.g., 16 U.S.C., §1-3; 16 U.S.C. §201, 221.)

Appellant also cites 16 U.S.C. §668dd-668ee, the National Wildlife Refuge System Act of 1966, which provides, in part:

> The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several states to manage, control, or regulate fish and resident wildlife under state law or regulations in any area within the system.

And 16 U.S.C. §1271, *et seq.*, the Wild and Scenic Rivers Act, provides, at §1284(a):

> Nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife.

And 16 U.S.C. (Supp. III) §1531 *et seq.*, the Endangered Species Act of 1973, provides, at §1533(d):

(Continued on following page)

These statutes amply illustrate that Congress has meticulously observed the traditional constitutional and common law powers and rights of the States with regard to resident wild animals, mindful of the decisions of this Court with regard thereto; that is, until Congress enacted the Wild Free-Roaming Horses and Burros Act, which contains none of the constitutional underpinnings of the foregoing statutes.

On the other hand, should the Wild Free-Roaming Horses and Burros Act be sustained herein, Congress will be free to nullify the conservation, fish and game, and estray laws of the respective States, causing irreparable injury to the States and their citizens and infringing on

---

Footnote Continued—

> The Secretary may by regulation prohibit with respect to any threatened species . . . except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to §1535(a) of this title *only to the extent that such regulations have also been adopted by such State* (Emphasis added).

And finally, Appellant cites the Fur Seal Act of 1966, 16 U.S.C. §1151 *et seq.* and the Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. III) §1361 *et seq.*, which are constitutionally sound, and distinguishable from the Wild Free-Roaming Horses and Burros Act. Within the statutes themselves, Congress expressly finds that the subject animals or their products *move in interstate commerce.*

The United States has obtained exclusive jurisdiction in other specific examples of parks or refuges, because of an express cession of jurisdiction over the land by the State to the United States. For example, Yellowstone National Park, Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222 and 1891 Mont. Laws 262, February 14, 1891; *Yellowstone Park Transp. Co.* v. *Gallatin County*, 31 F.2d 644 (9th Cir. 1929), *cert. den.* 280 U.S. 555 (1929); Mount Rainier National Park, 1901 Session Washington Laws 192; *Rainier Nat. Park Co.* v. *Martin*, 23 F. Supp. 60 (W.D. Wash. 1938), *aff'd* 302 U.S. 661 (1938); Mesa Verde National Park, Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. §117; Pisgah National Game Preserve, 1915 North Carolina Laws 205, N.C.C.A. (1939); *Chalk* v. *United States*, 114 F.2d 207 (4th Cir. 1940), *cert. den.* 312 U.S. 679 (1941).

the sovereignty of the States as attested to by the Tenth Amendment of the Constitution. In the western states, where the proportion of federal lands is substantial (e.g., Nevada—87%; Alaska—96%; New Mexico—34%),[5] this would effectively put to rest the traditional concept of state regulation, control and trustee powers over resident wild animals. Zealous regard and due recognition of the powers belonging to the States must be had if we are to maintain the balance of the federal-state system as contemplated by the Constitution. *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941).

At pp. 10-11 of its Statement, Appellant quotes statements apparently made by those proposing the Wild Free-Roaming Horses and Burros Act, from Senate and House Committee Reports, alleging that these Committee Reports sustain the Act as based upon the Commerce Clause. However, interstate commerce is not mentioned by the statements set forth by Appellant, nor was any such "finding" of interstate commerce made. Nor does the legislative history discussed by Appellant find or state that there is any *effect* upon interstate commerce. The Act itself contains no finding or language concerning interstate commerce or any effect thereon (as do the Fur Seal Act and the Marine Mammal Protection Act, discussed by Appellant at p. 9 of its Statement).

There is no evidence before this Court that these animals, or any activities relating thereto, affect or are a part of interstate commerce. As found by the court below (Memorandum Opinion, page 6), "No evidence was presented to support this theory; in fact, all the evidence

---

5. General Services Administration, Washington, D.C., *Inventory Report on Real Property Owned by the United States throughout the World, as of June 30, 1967*, Table 4, p. 46.

establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail." Congress in this Act obviously did not declare or find any connection with, or effect upon, interstate commerce because such does not exist.

The Act itself is clear and unequivocal on its face, relying solely upon the powers of the United States with regard to public lands. Resort to legislative history is, therefore, unnecessary since the statute is not ambiguous. *United States* v. *Oregon*, 366 U.S. 643 (1961). The quotations from the Committee Reports set forth by Appellant, irrelevant because failing to mention interstate commerce, should be disregarded by this Court for this additional ground. Legislative history, where contradictory or ambiguous, should not be permitted to control the clear and customary meaning of the words used in the statute itself. *N.L.R.B.* v. *Plasterers' Local Union No. 79*, 404 U.S. 116 (1971). In the absence of ambiguity the literal language of the Act controls, and Appellant's misplaced reliance on the legislative history is not only unnecessary but improper. *Elm City Broadcasting Corp.* v. *United States*, 235 F.2d 811 (D.C. Cir. 1956); *Haskell* v. *United States*, 241 F.2d 790 (10th Cir. 1957), *cert. den.* 354 U.S. 921 (1957); *Tampa Electric Company* v. *Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *reversed on other grounds*, 365 U.S. 320 (1961).

II.

Whether the Act intrudes upon the sovereignty and legislative authority of the State as attested to by the Tenth Amendment, and undermines the traditional concepts of State powers over resident wild animals.

This Court, in *South Carolina* v. *United States*, 199 U.S. 437 (1905), which concerned the right of the State to collect an excise tax from liquor sellers, stated that, as a general proposition:

> There are certain matters over which the national government has absolute control and no action of the State can interfere therewith, and there are others in which the state is supreme, and in respect to them the national government is powerless. To preserve the even balance between these two governments, and hold each in its separate sphere, is the peculiar duty of all of the courts . . . 199 U.S. at 448.

Appellees submit that the subject of the Wild Free-Roaming Horses and Burros Act is among those matters "in which the States are supreme." As stated in *Geer* v. *Connecticut*, 161 U.S. 519 (1896), "The wild game within a state belongs to the people in their collective sovereign capacity." 161 U.S. at 529.

Other excerpts from opinions of this Court establish the Appellees' position with regard to the subject animals:

> The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that

may be acquired therein. *Lacoste* v. *Department of Conservation*, 263 U.S. 545 at 549 (1924).

The adjudicated cases recognizing the right of the States to control and regulate the common property in game are numerous. *Geer* v. *State of Connecticut*, 161 U.S. 519 at 528 (1896).

For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *McCready* v. *Virginia*, 94 U.S. 391, at 394 (1865).

More recently, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court reaffirmed the continuing vitality of *Geer* and *McCready*, and described the foundation of the States' powers with regard to their wild animals as follows:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the *importance to its people that a state have power to preserve and regulate* the exploitation of an important resource. 334 U.S. at 402 (Emphasis added).

Counsel for Appellant, in trial briefs below, read this Court's decision in *Toomer* as laying to rest the doctrine of State powers over wild animals. Appellees submit that this Court in *Toomer* did not inter the doctrine of State control and power over wild animals, but rather, reaffirmed the doctrine. The Court simply stated that the State's powers arise from *trustee* ownership, and not *technical* ownership, in the true sense of the word. In the exercise of these powers, the States may regulate and control the taking, subsequent use and property rights in resident wild animals, and exercise any and all authority that true, technical ownership ordinarily confers. *Geer*, *Toomer*, *Lacoste*.

In a concurring opinion in *Toomer*, Justice Frankfurter for himself and Justice Jackson emphasized the need to read the Privileges and Immunities Clause (at issue in *Toomer*) in connection with the Tenth Amendment which "presupposes the continued retention by the State of powers that historically belonged to the States and which were not explicitly given to the central government or withdrawn from the States". 334 U.S. at 408. Referring to the Privileges and Immunities Clause, Justice Frankfurter stated:

> This clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. 334 U.S. at 408 (concurring opinion).

There is no evidence of any attempt by the State herein to control the wild animals as a part of a regulation of commerce between the States, nor is such alleged.

The rationale set forth in *Lacoste*, *Geer*, *McCready*, and *Toomer* has been frequently reiterated by the courts:

Hunt v. *United States*, 278 U.S. 96 (1928);

Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928);

Ward v. *Race Horse*, 163 U.S. 504 (1896);

Silz v. *Hesterberg*, 211 U.S. 31 (1908);

Patsone v. *Pennsylvania*, 232 U.S. 138 (1914);

Carey v. *South Dakota*, 250 U.S. 118 (1919);

State of Maine v. *Tamano*, 357 F. Supp. 1097 (D. Me. 1973);

State of Maryland v. *Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972);

Arkansas State Game and Fish Commission v. *W. R. Wrape Stave Co.*, 76 F. Supp. 323 (E.D. Ark. 1948);

United States v. *Plott*, 345 F. Supp. 1229 (S.D. N.Y. 1972);

A. E. Nettleton Co. v. *Diamond*, 264 N.E.2d 118 (N.Y. 1970);

Barrett v. *State of New York*, 116 N.E. 99 (N.Y. Ct. App. 1917);

New Mexico State Game Commission v. *Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. den.*, 396 U.S. 961 (1969).

At the same time it is likewise settled that State authority over wild animals must be exercised within the confines of applicable constitutional limitations. As indicated above, State law yields where in conflict with a treaty made under the authority of the United States treaty powers, *Missouri* v. *Holland, supra*; and, a State may not discriminate without reason against citizens of other States in violation of the Privileges and Immunities Clause, *Toomer* v. *Witsell, supra*. Neither of these limitations is herein at issue, nor is such argument made by Appellant. The federal power to destroy wild animals which are damaging federal lands is inapplicable, as discussed above.

The opinion of the District Court in *United States* v. *Plott, supra*, is especially pertinent to the attempt of the Wild Free-Roaming Horses and Burros Act to "transmute" animals into federal property:

> . . . for it is clear that the States in question here do own wildlife and game within the meaning of §2314. The *Geer* rule, which is still the federal law, far from holding that the State does not own wild animals, clearly specifies that it does. Not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common. Thus, *Geer* regards a State's relationship to wild animals as an owner in trust, and taking from an owner in trust constitutes stealing or converting within the meaning of §2314 just as much as taking from any other owner. 345 F. Supp. at 1232.

In addition to these powers arising from the authority of an owner in trust, State legislative authority over the subject animals is derived from its police power. Thus, as stated in *Geer*, "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, *which is equally conclusive*. The right to preserve game flows from the undoubted existence in the State of a police power to that end . . ." 161 U.S. at 534 (Emphasis added).

It is clear that the legislative authority and police power of the State extends over federally owned lands within the State, to the same extent as over similar property held by private owners. *Wilson* v. *Cook*, 327 U.S. 474 (1946).

The uncontradicted evidence below establishes that the subject animals: 1) Proliferate rapidly; 2) Cannot peacefully coexist upon the same lands with domestic livestock; 3) Attack and often injure domestic livestock; and 4) Consume feed supplement which is purchased and placed

on private, state and federal permit lands by domestic livestock operators (Tr. 8-9; 41-42; 44; 55-56). Appellees submit that this Court may take judicial notice of the fact that the subject animals, as any animal, are subject to contracting and spreading contagious or infectious diseases.

Appellee, New Mexico Livestock Board, was created to promote greater economy, service, and efficiency in the livestock industry of New Mexico, and to protect the industry from theft and contagious or infectious diseases among animals. 47-23-1 and 47-23-6 N.M.S.A. (1973 Pocket Supp.), *supra*, at p. 2. The State of New Mexico, and the New Mexico Livestock Board, under the State's estray laws and by authority of the United States Constitution, have the responsibility and the right to exercise the State's inherent police power to regulate and control the subject animals so as to prevent the above damages caused by these animals. The State must have the authority to prevent the spread of contagious or infectious disease among its bovine animals, and further, to protect the life, health, welfare and property of the citizens of this State. See, *Clason* v. *State of Indiana*, 306 U.S. 439 (1939), upholding an Indiana statute regulating the transportation and disposal of carcasses of large animals not slaughtered for human food. The Wild Free-Roaming Horses and Burros Act contains no provision for compensation of the citizens of this State for the damages caused by the foregoing activities of these animals, nor does the Act seek to prevent, or in any way regulate, the spread of contagious or infectious diseases by or among the subject animals.

Appellees submit that should this Court uphold the Act, Congress will be free to claim possession of, regulate, control or destroy any wild animals which at any time may touch upon the public domain. In the predominantly federal-land western States, all State statutes and regulations

concerning such animals (e.g., fish and game, estrays, hunting, nonresident licensing, etc.) will be virtually abrogated. Such a result would completely undermine the sovereignty and the traditional rights of the States and their citizens, and would deal a severe blow to the economies of the respective States.

This Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of a continuing power on the part of the States to legislate in their customary fields. *South Carolina* v. *United States*, *supra*; *Federal Compress and Warehouse Co.* v. *McLean*, 291 U.S. 17 (1934); *Townsend* v. *Yeomans*, 301 U.S. 441 (1937); *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1943); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Appellants' exaggerated view of federal authority and power under the Property Clause, if carried to its logical conclusion, would blot out all State power and legislative authority with regard to public lands within the States. For example, Nevada (87% federal lands) and Alaska (96% federal lands) will become federal property, and Congress will become the State legislature as regards that portion of a State which is public domain. As expressed by Justice White in *Ward* v. *Race Horse*, *supra*, at 514, "(those States) would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner . . . would be exempt in this regard from the authority of the State. (The State) then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of Statehood and incident to its plenary existence."

CONCLUSION

The decision of the three-judge court should be affirmed, or in the alternative, this appeal should be dismissed.

Because the western States are so substantially affected by the subject Act, the Appellees respectfully request this Court to give due consideration to the *amicus curiae* briefs filed herein by Idaho, Nevada, and by the Pacific Legal Foundation of California.

Should this Court decide to reverse the court below, Appellees respectfully request the Court to remand this cause to the three-judge court for determination of Appellees' Second Cause of Action, which was not reached by the court below because of the court's ruling on the First Cause of Action.

Respectfully submitted,

GEORGE T. HARRIS, JR.
Special Assistant Attorney General
State of New Mexico

GEORGE J. HOPKINS
Of Counsel
Post Office Box 2168
Albuquerque, New Mexico 87103
Attorneys for Appellees